160 U.S. 319

160-319

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 544.

WILLIAM H. MARKHAM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED MARCH 4, 1895.

(15,814.)

(15,814.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 544.

WILLIAM H. MARKHAM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Writ of error	1	1
Caption	2	1
Indictment	2	1
Arraignment and plea	9	5
Minutes of trial	9	5
Verdict	10	5
Motion in arrest of judgment	11	6
Order overruling motion in arrest of judgment	12	6
Judgment and sentence	13	7
Opinion on motion to arrest judgment	14	7
Assignment of error	20	10
Petition for writ of error	21	10
Order allowing writ of error	22	11
Order accepting bail	22	11
Power of attorney	23	12
Bond	25	13
Clerk's certificate	26	13
Citation	28	14
Proof of service of citation	29	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1895.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, and William H. Markham, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

2 Proceedings of the district court of the United States for the district of Kentucky, at its regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 1st, 1894.

Present: Honorable John W. Barr, judge of the United States for said district.

THE UNITED STATES OF AMERICA
vs. } = 4775.
WM. H. MARKHAM.

Be it remembered that heretofore, to wit, on the 9th day of October, 1893, came the grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the district of Kentucky, and returned into court the following indictment:

UNITED STATES OF AMERICA, } *set:*
District of Kentucky, }

In the District Court of the United States for the Sixth Judicial Circuit and District of Kentucky, Held at Louisville, October
3 Term, in the Year of our Lord eighteen hundred and ninety-three.

THE UNITED STATES OF AMERICA } Indictment. A True Bill.
vs. }
WM. H. MARKHAM. } W. H. Shears, Foreman.

The grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the district of Kentucky, on their oath present that William H. Markham, late of the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, at Bowling Green, in the district aforesaid, did in due form of law take an oath before one G. C. Loomis in giving a deposition in regard to a claim of said William H. Markham then depending before the Commissioner of Pensions of the United States for a pension from the United States, said Markham being then and there a claimant for a pension from the United States; that a certain written deposition then and there by him, said Markham, subscribed was then and there true, and said Markham did then and there feloniously, falsely, wilfully, and contrary to said oath subscribe a certain material matter which he, said Markham, did not then and there believe to be true and which then and there was not true—that is to say, that said Markham did then and there subscribe said deposition and then and there subscribed a statement therein contained of the tenor following, to wit, "Also in spring of 1864, I think, I accidentally shot the forefinger of my right hand with a revolver, injuring it so badly that in 1866, after I came home, I had the finger unjointed at knuckle-joint by a Dr. Moore;" which said statement that said Markham shot the forefinger of his right hand with a revolver in the spring of 1864 was
4 then and there a material matter in an investigation then depending before the Commissioner of Pensions of the United States of a claim of said Markham for a pension from the United States.

And the jurors aforesaid upon their oath aforesaid further present that said G. C. Loomis was then and there a special examiner of the Pension Bureau of the Department of the Interior of the United States of America and was then and there a competent person and had competent authority to administer said oath to said William H. Markham, and the giving of said deposition was then and there a case in which a law of the United States then and there authorized an oath to be administered, and in truth and in fact said William H. Markham had not shot the forefinger of his right hand with a revolver in the spring of 1864, as said Markham then and there very well knew, and said William H. Markham did then and there falsely and wilfully commit wilful and corrupt perjury.

Against the peace and dignity of the United States and contrary to the form of the statute in such case and made and provided.

Second count, 5392–5396.

And the grand jurors aforesaid upon their oaths aforesaid do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, eighteen hundred and ninety-two, in a case in which a law of the United States then and there authorized an oath to be administered, to wit, in an investigation then depend-
5 ing before the Commissioner of Pensions of the United States of a claim of said William H. Markham for a pension from the United States before a competent person, to wit, before G. C. Loomis, who was then and there a duly appointed and qualified special examiner of the Pension Bureau of the United States and then and there had competent authority to administer an oath in said case, the said William H. Markham had taken an oath that a certain written deposition then and there by him subscribed was then and there true, and the said William H. Markham did then and there feloniously, wilfully, and contrary to his said oath subscribe a certain material matter which he, said William ——, did not then and there believe to be true, and which said material matter was then and there not true, and which said material matter was then and there a statement contained in said deposition of the tenor following, to wit:

"I reckon you want to know if I ever cut off the forefinger of r't hand with a circular saw (meaning by the words 'r't hand' the right hand of said William H. Markham). No, sir; I never did that."

Whereas in truth and in fact, as said William —— then and there very well knew, he, said William ——, had then and theretofore cut off the forefinger of his right hand with a circular saw; and so the jurors aforesaid upon their oaths aforesaid present that said William H. Markham did commit wilful and corrupt perjury in manner and form as in this count aforesaid.

Against the peace and dignity of the United States and
6 contrary to the form of the statute in such case made and provided.

Third count, 5392.

And the grand jurors aforesaid upon their oaths aforesaid do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, eighteen hundred and ninety-two, G. C. Loomis was a competent officer and had by law competent authority to administer the oath hereinafter mentioned, and was then and there a duly appointed and qualified special examiner of the Pension Bureau of the United States, and said G. C. Loomis was then and there investigating and inquiring into a claim of one William H. Markham for a pension from the United States, and the written deposition hereinafter mentioned was taken before said Loomis, officer as aforesaid, in the course of said investigation and inquiry, and the taking of said deposition in said inquiry was then and

there a case in which a law of the United States then and there authorized said oath to be administered, and the said William H. Markham then and there subscribed said written deposition and then and there took an oath before said Loomis, officer as aforesaid, that said deposition was then and there true, and was then and there asked a question of the tenor following, to wit:

"Did you ever saw your forefinger of right hand?" and did then and there make an answer and statement of the tenor follow-
7 ing, to wit, "No, sir; I never did," and then and there subscribed said answer and statement then and there contained in said deposition; which said answer and statement was then and there material matter upon said inquiry, and which said statement the said Markham did not then and there believe to be true, and which said statement was then and there not true, whereas in truth and in fact the said Markham had theretofore sawed the forefinger of his right hand, as he, the said Markham, then and there very well knew.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Fourth count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, the matter of the hereinafter-mentioned deposition became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia; whereupon said William H. Markham did then, at said Bowling Green, wilfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the Pension Bureau of the United States and then and there a competent officer and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham subscribed was then and there true,
8 and in giving said deposition said Markham was asked by said Loomis a question in substance and effect as follows, to wit, "Have you received any injury to forefinger of r't hand since the war or since your discharge from the army?" (by which said question said Loomis referred and said Markham well understood said Loomis to refer to the right hand of said Markham), and in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows, to wit, "No, sir; I never have;" which said statement that said Markham never had received any injury to the forefinger of his right hand since his, said Markham's, discharge from the army was then and there material to said inquiry and was then and there not true.

Whereas in truth and in fact the said Markham had then and theretofore received an injury to the forefinger of his, said Markham's, right hand, as he, the said Markham, then and there very well knew.

And so the jurors aforesaid upon their oaths aforesaid say that said Markham did commit wilful and corrupt perjury in manner and form as in this count aforesaid.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

GEORGE W. JOLLY,
United States Attorney, Kentucky District.

9 Witnesses: G. C. Loomis, Wm. S. Martin, Josiah D. Kirby, J. H. Hoffher, D. G. Brown, Bowling Green, Ky.; C. P. Atwood, Simpson Co., Franklin P. O.; Harry Snow, Mrs. Snow.

And at a term of our court held for its October term, 1894, to wit, on the 2nd day of October, 1894, came the district attorney; came also the defendant, having Sam'l McKee for his attorney; thereupon it was demanded of him, the said Wm. H. Markham, of and concerning the charges in the above indictment specified; he says he is not guilty thereof and for his trial he puts himself upon the country; thereupon came a jury, to wit, Mark Randolph, W. M. Shelley, Henry Alexander, G. W. Gwinn, Thos. A. Bradley, J. R. Walkup, Steve Guthrie, J. T. McMillan, F. Y. Patterson, Pleas Marcum, W. G. Smith, and Dan. Barr, who were elected, tried, and sworn to well and truly try and true deliverance make between the United States and Wm. H. Markham.

The evidence was heard in part, and, there not being time to conclude same today, time is given until tomorrow. The jury is adjourned until tomorrow morning at 9½ o'clock. It is ordered that the defendant be committed to the custody of the marshal until the further order of court.

10 And on another day of said term of said court, to wit, on the 3rd day of October, 1894, came the district attorney. The defendant appeared in custody of the marshal.

Came also the jury pursuant to order of adjournment. The evidence was concluded, and, there not being time for counsel to argue the same today, time is given until tomorrow. The jury is adjourned until tomorrow morning at 9½ o'clock.

And on the 4th day of October, 1894, came the district attorney. The prisoner was brought to the bar of the court in custody of the marshal. Came also the jury pursuant to order of adjournment.

The arguments of counsel were heard and, the court having delivered its instructions to the jury, the jury retired to consider of their verdict and returned into court the following verdict, to wit, "We, the jury, find the defendant Markham guilty as charged in the fourth count of the indictment. M. L. Randolph, foreman."

The court, not being advised of the judgment herein, takes time. It is ordered that the prisoner remain in custody of the marshal until the further order of court.

And on another day of said term of said court, to wit, on the 8th day of October, 1894, came the defendant, by his attorney, and moves the court for an arrest of judgment on the verdict of the jury

on the fourth count of the indictment herein, and filed written grounds, which are as follows:

11 THE UNITED STATES } *against* WM. H. MARKHAM. } Motion in Arrest of Judgment.

The defendant moves the court for an arrest of judgment on the verdict of the jury on the fourth count of the indictment herein:

First. Because said count charges no offense under the statute.

Second. That the averments therein are insufficient and not sufficiently definite and certain to inform the court that any offense has been committed, nor that Loomis, examiner, was authorized to administer the oath alleged.

Third. That said averments therein do not set forth the proceeding or cause in which the defendant is charged to *to* have given his deposition or made oath to the statement averred as false in such manner or in any manner sufficient to inform the court or the defendants that the deposition itself nor the alleged false statement was material to an inquiry before the Commissioner of Pensions, nor of what said inquiry was concerning, nor that said oath or said deposition or said statement alleged to have been false was material to any matter or cause pending before the Commissioner of Pensions, nor does it aver and show that said Loomis, special examiner, had any lawful authority to swear or require the defendant to swear to the deposition or statement averred as false, nor for what purpose nor upon what cause or investigation of what claim or of any claim pending before any department of the Government or in any

12 court, and has therein no averment sufficient to show whether said statement charged to have been made were material for an inquiry pending or within the jurisdiction of the Commissioner of Pensions.

Fourth. That it does not aver facts sufficient to show the materiality of the oath or statement alleged to have been made to any matter whatever.

Fifth. That the words charged to have been sworn to by defendant are not averred to have been made oath to or sworn to "willfully and corruptly," and the language of the count is not sufficient under the statute.

Sixth. That it fails to aver what charge was under investigation.

And now, after verdict and before sentence, comes the said William H. Markham and prays the judgment herein may be arrested on the causes hereinabove alleged and for other manifest defects in said count and in the record aforesaid appearing.

SAMUEL McKEE,
Attorney for Defendant.

And on the 7th day of November, 1894, came the district attorney. The prisoner was brought to the bar of the court in custody of the marshal, having Sam'l McKee for his attorney.

The court, being now fully advised of the prisoner's motion in arrest of judgment herein, filed a written opinion, and in pursuance thereof it is ordered that said motion in arrest of judgment be, and the same is hereby, overruled; to which ruling of the court the prisoner, William H. Markham, excepts.

13 And on the 1st day of December, 1894, came the district attorney. The prisoner, William H. Markham, was brought to the bar of the court in custody of the marshal; whereupon it was again demanded of him, the said Markham, if he had anything further to say why the court ought not upon the premises and verdict of the jury herein now proceed to pronounce judgment against him, to which he answered he had nothing which had not been before alleged, and nothing further was alleged.

It is therefore considered by the court that the said William H. Markham, for the crime against the United States of which he is charged in the fourth count of this indictment and of which he has been found guilty by the jury in their verdict herein, do make his fine to the said United States by the payment to them of $5.00 (five dollars), also their costs herein expended, and that he be imprisoned and confined and kept at hard labor in the Indiana State prison, south, at Jeffersonville, Indiana, for the full period of two years from this 1st day of December, 1894. The defendant desiring to appeal to a justice of the Supreme Court of the United States for a writ of error, the marshal of this court is directed not to convey the accused to said prison until after the expiration of ten days from date.

14 UNITED STATES } Opinion on Motion to Arrest Judgment.
vs.
WM. H. MARKHAM. }

The defendant Markham has been found guilty of the crime of perjury, as charged in the fourth count of the indictment, and he has, by counsel, moved the court for an arrest of judgment because it is claimed this count is fatally defective.

This count is as follows:

"And the grand jurors aforesaid upon their oaths aforesaid do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, the matter of the hereinafter-mentioned deposition became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia; whereupon said William H. Markham did then, at said Bowling Green, wilfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the Pension Bureau of the United States and then and there a competent officer and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham subscribed was then and there true, and in giving said deposition said Markham was asked by said

Loomis a question in substance and effect as follows, to wit,
15 'Have you received any injury to forefinger of r't hand since the war or since your discharge from the army?' (by which said question said Loomis referred and said Markham well understood said Loomis to refer to the right hand of said Markham), and in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows, to wit, 'No, sir; I never have;' which said statement that said Markham never had received any injury to the forefinger of his right hand since his, said Markham's, discharge from the army was then and there not true and said Markham did not then and there believe said statement to be true.

"Whereas in truth and in fact the said Markham had then and theretofore received an injury to the forefinger of his, said Markham's, right hand, as he, the said Markham, then and there very well knew.

"And so the jurors aforesaid upon their oaths aforesaid say that said Markham did commit wilful and corrupt perjury in manner and form as in this count aforesaid.

"Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided."

The counsel has urged several objections, but some of them need not be considered, as they are covered by the expressed provisions of sections 5392 and 5396, which are in these words, viz:

"SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a
16 law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or other certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

"SECTION 5396. In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

It will be observed section 5392 covers "an oath in any case in which a law of the United States authorizes an oath to be administered," and thus included oaths taken which are not in judicial pro-

ceedings. See U. S. *vs.* Hearing, 26 Fed. R., 745; U. S. *vs.* Boggs, 31 Fed. R., 338; U. S. *vs.* Curtis, 107 U. S., 671.

17 The allegation that the accused "wilfully and corruptly" took the oath is sufficient and there need not be an allegation that it was "feloniously" taken.

The crime charged in this indictment is not perjury at common law, but a statutory crime as defines in section 5392, and the allegation made is substantially in the language of the statute. U. S. *vs.* Hearing, *supra*.

The only serious question is whether this count alleges sufficiently the materiality of the alleged false statement and has specified sufficiently the inquiry of the Commissioner of Pensions under which it was made.

The count states the matter in the deposition which is alleged to be false "became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia," and in another part of the count it is alleged said false statement "was then and there material to said inquiry."

But there is no other allegation as to its materiality, nor is there a further description of the inquiry before the Commissioner of Pensions or its object and scope.

Thus neither the court or the accused was informed by the allegations of this count wherein and how the alleged false statement was material in the pending investigation which has been had by the Commissioner of Pensions.

This omission made the count bad at common law upon demurrer. U. S. *vs.* Wilcox, 4 Blatch., 391; U. S. *vs.* McHenry, 6 Blatch., 504.

18 The remaining inquiry is whether this defect is so vital as to require the arrest of the judgment on a verdict of "guilty" upon it.

At common law objections which would have been fatal on demurrer would be so equally on motion in arrest of judgment. Bishop Crim. Pro., sec. 1286.

We think section 1025 of Revised Statutes has modified the common-law rule, both as to demurrers and motions in arrest of judgment, in that it requires the defect, in form of an indictment, to "tend to the prejudice of the defendant," else it must stand.

In this count there is an allegation that the false statement was material in an inquiry which was pending before the Commissioner of Pensions.

The defect is, the pending inquiry was not specified, but this was made certain by the testimony and shown to be an inquiry about the defendant's application for a pension. The false statement was in writing and shown to be material by the evidence.

After verdict this defect in the count cannot tend to defendant's prejudice unless he would be liable to another indictment for the same false statement, but this could not possibly be, as the allegations of this count, though broad and general, would cover any pos-

sible indictment for perjury for this alleged false statement in writing.

Section 1025 applies not only to the indictment and trial, but also to the "judgment or other proceeding thereon."

19 We think this count of the indictment has not omitted to allege the materiality of the false statement and that there was a pending investigation, but has alleged these facts defectively, because too generally, which defect has been cured by the verdict. U. S. *vs.* McHenry, 6 Blatch., 504.

The motion in arrest of judgment must be overruled, and it is so ordered.

And on the 1st day of December, 1894, came the defendant, by his counsel, and filed his petition for writ of error, which is as follows:

20 The following is the assignment of errors filed by the defendant:

In the District Court of the United States, on Writ of Error to the Supreme Court of the United States from the District of Kentucky.

THE UNITED STATES
against
WM. H. MARKHAM. } Assignment of Errors.

Now the plaintiff in error, William H. Markham, assigns for errors on the writ of error granted herein by the Supreme Court of the United States:

"That the district court erred in entering judgment on the indictment; that the court erred in not sustaining his motion in arrest of judgment, and for the grounds and causes in said motion alleged, which is referred to and made a part hereof and the same set up and filed with his petition for the writ of error, and he prays the action of said court be reversed."

WM. H. MARKHAM,
By SAMUEL McKEE, *Att'y.*

21 To the Honorable John M. Harlan, justice of the Supreme Court of the United States:

Your petitioner, William H. Markham, respectfully presents that at the October term, 1894, of the district court of the United States for Kentucky district, held at Louisville, on an indictment, copy herewith filed and made a part hereof, marked A, he was found guilty on the fourth count thereof, as shown by the endorsement thereon.

That thereafter, on the 8th day of October, 1894, he filed and entered a motion in arrest of judgment, on grounds therein set out, which are shown by a copy of said motions aforesaid herewith filed and made part hereof, and which, being heard and submitted, were by the court, on the 7th day of November, 1894, overruled, and

thereafter, on December 1st, 1894, the court sentenced your petitioner to the term of two years' imprisonment at hard labor in the penitentiary at Jeffersonville, Indiana, and to pay a fine of $5.00, shown by the order, a copy of which is herewith filed and made a part hereof.

To all of which action of the court your petitioner excepted and objected, and now comes your petitioner and files this his petition and says that the action of said court in overruling his motion in arrest of judgment was and is error in law, and, to the end that said errors alleged by him may be inquired into, reviewed, and revised and passed upon, he prays your honor to grant to him a writ of error to the Supreme Court of the United States from the action of said district court, and on the granting of said writ asks an
22 order superseding judgment until the same can be heard, and that said writ be made to operate as a stay of proceedings and the petitioner be admitted to bail pending same. He is prepared to execute bonds to prosecute his suit and give bail on such terms as may be prescribed.

Respectfully, WILLIAM H. MARKHAM,
By SAMUEL McKEE, *Att'y.*

Upon which petition there appeared the following endorsement:

Writ of error in the case herein mentioned is allowed, with supersedeas and stay of execution. The question of admitting the accused to bail pending the writ of error and the amount of such bail is remitted to the court in which the petitioner was tried. This December 6th, 1894. John M. Harlan, asso. justice, Sup. Ct. U. S.

And on another day, to wit, on the 22nd day of December, 1894, came Arthur M. Wallace, assistant United States attorney. The prisoner, Wm. H. Markham, was brought to the bar of the court in custody of the marshal, having Samuel McKee & Isaac P. Caldwell for his attorneys.

The question of admitting the accused to bail pending the writ of error and the amount of such bail having been remitted to this court by Mr. Justice Harlan—
23 It is therefore ordered that the said Wm. H. Markham do find bail in the sum of $2,500.00, with good security in the like sum. Thereupon the said Markham tendered his bond in the penalty of $2,500.00, conditioned according to law, with E. Hills, L. C. Huninger, & T. J. Sullivan as sureties, which bond is approved.

It is therefore ordered that the said Markham be discharged from the custody of the marshal.

And on the 22nd day of December, 1894, came the defendant, by counsel, and filed the following power of attorney and appeal bond, which are in the words and figures as follows, to wit:

STATE OF KENTUCKY, }
County of Warren. }

We, Ellis Hills, L. C. Heininger, and T. J. Sullivan, of the county and State above, constitute, authorize, and appoint Samuel McKee, of Louisville, our attorney-in-fact and for us to sign our names as sureties or, as need be, to any bond required of William H. Markham that he will prosecute to the Supreme Court of the United States the writ of error which has been allowed by Hon. John M. Harlan, justice of the Supreme Court of the United States, to or from a judgment had against said William H. Markham in the district court of the United States for the district of Kentucky at its October term, 1894, at Louisville, on an indictment for perjury,
24 and that he will prosecute said writ of error to effect and abide the judgment of the court therein.

We further authorize our said attorney, Samuel McKee, to sign our names to such bail bond as sureties thereto in such sum as the court may fix for the said William H. Markham, accused, as bail on said writ of error named above on the supersedeas and stay of execution or sentence or judgment which has been granted by said justice, John M. Harlan, and dated December 6th, 1894, in form, manner, and amount for bail (as may be by the court prescribed) pending said writ, all the acts of our said attorney to have the same force and effect as if done by us in person.

And we each do solemnly swear that we are worth in property subject to execution for debt under the laws of Kentucky, over and above our debts, encumbrances, and liabilities, as much and above the sums set opposite each of our names:

The said E. Hills, in personal property, $500.
In real estate, $2,000.
The said L. C. Heininger, in real estate, $2,000.
In personal property, $1,000.
The said T. J. Sullivan, in real estate, $2,000.
In personal property, $1,000.
Given under our hands this December 10th, A. D. 1894.

E. HILLS.
L. C. HEININGER.
T. J. SULLIVAN.

STATE OF KENTUCKY, }
County of Warren, } ss:

I, W. W. Mansfield, a notary public in and for the county
25 and State above, certify that E. Hills, L. C. Heininger, and T. J. Sullivan each this day in person appeared before me and made oath to and signed — acknowledged the foregoing power of attorney and made oath to the statements as to worth of their property; that the parties are well known to me and are credible on oath, reputable men, and, in my opinion, are amply good and sufficient as sureties in the sum above the aggregates in which they have affirmed or justified and sworn to.

Given under my hand and official seal this December 10th, A. D. 1894.

[SEAL.] W. W. MANSFIELD,
Notary Public, Warren County, Ky.

District Court of the United States, District of Kentucky.

WILLIAM H. MARKHAM, Pl'ff in Error,
vs.
UNITED STATES, Def't in Error.

Know all men that we, William H. Markham, E. Hills, L. C. Heininger, & T. J. Sullivan, acknowledge ourselves jointly and severally indebted to the United States of America in the just and full sum of two thousand five hundred dollars, which we agree shall be levied and made of our respective goods and chattels, lands and tenements, and unto the use of the said United States to be rendered.

But on condition that the above William H. Markham doth prosecute a writ of error to the Supreme Court of the United
26 States which he has heretofore sued out in this case, and that he shall abide the judgment of said Supreme Court thereon and the judgment of this court rendered hereunder, and, further, he (said William H. Markham) personally appear in this court and surrender himself to this court (district court of Kentucky, held at Louisville) when or after the mandate of said Supreme Court is filed therein, when notified so to do by notice in writing served upon said William H. Markham or either of the parties hereto, viz., E. Hills, L. C. Heininger, & T. J. Sullivan, on a day named therein, and if said William H. Markham complies and performs the conditions hereof, then this bond and obligation is to be null and void; else to remain in full force and virtue.

Witness our hands this 22nd day of December, 1894.

W. H. MARKHAM.
E. HILLS,
By SAMUEL McKEE,
Att'y-in-fact.
L. C. HEININGER,
By SAMUEL McKEE,
Att'y-in-fact.
T. J. SULLIVAN,
By SAMUEL McKEE,
Att'y-in-fact.

Approved December 22nd, 1894.

JNO. W. BARR,
District Judge.

UNITED STATES OF AMERICA, } ss:
District of Kentucky,

27 I, Thomas Speed, clerk of the district court of the United States for the district of Kentucky, at Louisville, by virtue of

the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 25, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of William H. Markham, plaintiff in error, against The United States of America, defendant in error, as the same remains of record and on file in said office.

In testimony I have caused the seal of said court to be hereunto affixed, at the city of Louisville, this 3 day of Jan'y, 1895.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

28 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Kentucky, wherein William H. Markham is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this sixth day of December, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

29 On this tenth day of December, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared John B. O'Neal before me, the subscriber, and makes oath that he delivered a true copy of the within citation to William M. Smith, United States district attorney for the district of Kentucky.

JOHN B. O'NEAL.

Sworn to and subscribed the 10th day of December, A. D. 1894.

JOS. C. FINNELL,
Clerk U. S. Cir. Ct., Ky. Dist., at Covington.

Endorsed on cover: Case No. 15,814. Kentucky D. C. U. S. Term No., 544. William H. Markham, plaintiff in error, *vs.* The United States. Filed March 4, 1895.

Office Supreme Court U. S.
FILED
APR 13 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM H. MARKHAM, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 9389.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM H. MARKHAM, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 930.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court for the district of Kentucky, under section 5392 of the Revised Statutes, for perjury alleged to have been committed in a pension case, and was convicted at the October term, 1894, of said court. He has been admitted to bail in the sum of $2,500 pending the decision of this court on his writ of error.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such early day during the next term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof thereof filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

15532

Office Supreme Court, U. S.
FILED.
NOV 16 1895
JAMES H. McKENNEY,
CLERK.

544

Supreme Court of The United States

WM. H. MARKHAM, - Plaintiff in Error,

Against

THE UNITED STATES.

ERROR FROM THE DISTRICT OF KENTUCKY.

At October Term, 1894, at Louisville, Kentucky, District, Plaintiff in Error was found guilty on the Fourth Count of an Indictment then tried in said Court—charging Perjury—which said Count reads as follows:

FOURTH COUNT.

And the Grand Jurors aforesaid on their oaths aforesaid do further present that at Bowling Green in the District aforesaid on the seventh day of October, in the year of our Lord eighteen-hundred and ninety-two, the matter of the hereinafter mentioned deposition became ***material to an enquiry***, then pending before and within the Jurisdiction of the Commissioner of Pensions of the United States at Washington in the District of Columbia. Whereupon said William H. Markham, did then at said Bowling Green willfully and

corruptly take a solemn oath before G. C. Loomis, then and there a special Examiner of the Pension Bureau of the United States, and then and there a competent officer, and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham suscribed was then and there true, and in giving said depositions, said Markham was asked by said Loomis a question in substance and effect as follows to-wit: "Have you received any injury to forefinger of "rt hand since the war or since your discharge from the army" (by which said question said Loomis referred to, and said Markham well understood said Loomis to refer to the right hand of said Markham), and in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows to-wit: "No sir, I never have," which said statement that said Markham had never received any injury to the forefinger of his right hand since his said Markham's discharge from the army was then and there material to said enquiry, and was then and there not true, and said Markham did not then and there believe said statement to be true. Whereas in truth and in fact the said Markham had then and theretofore received an injury to the forefinger of his said Markham's right hand, as he the said Markham then and there very well knew.

And so the Jurors aforesaid, upon their oath aforesaid say that said Markham did commit willful and corrupt perjury in manner and form as in this count aforesaid, against the peace and dignity of the United States, and contrary to the form of the Statute in such case made and provided.

GEO. W. JOLLY,
United States Attorney,
Kentucky District.

A motion in arrest of judgment was made and over ruled, and on a petition the case comes here for review.

The errors asserted and relied on, are: That the Indictment—(the Count on which found guilty, being all that can be considered) on its face does not aver facts sufficient to sustain a judgment.

That its averments therein are insufficient for the Court to know the materiality of the matter charged to the alleged matter under investigation—it fails to set forth what matter was *being enquired into.*

This Count is short, and needs only to be examined to show its defects. There is not in it a single statement of what matters was pending before, or within the jurisdiction of the Commissioner of Pensions—nor that it was a claim of any kind authorizing a Special Examiner to enquire into—nor of any matter showing it to be such that the Commissioner of Pensions was authorized to examine same—nor to show that Markham or any others had a claim pending—or had had—and not a sentence by which or from which the Court can tell whether the alleged statement of Markham had any sort of materiality to anything. Not a single word setting forth what was being enquired into.

Surely a citizen is entitled to know and the Court to know, by a charge setting out the matter. The old rule laid down by Chitty's Com. Law, vol. 2, pages 306-7, is plain—has never been departed from by our Courts.

"The materiality of the false allegations must be avered, and so much of the matter recited, as will show the Court WHAT CHARGE was under investigation in order that the Court may know whether material or not."

Mr. Bishop, C. L., Sect. 519, says: Everything needed to sustain a conviction must be alleged, and that nothing can be left to intendment. The District and Circuit Courts, and this Court I am sure has fully sustained this view.

It seems to me, I would trespass on the Court to argue in support of this—I call attention to these authorities:

U. S. vs. Conway—4 Cranch, C. C. R., 615-16.

U. S. vs. Nickerson, 17 ~~Howell~~. Hare & Ewing

In a very late case, U. S. vs. ~~Evans~~.

153, U. S.—This Court Says—on page 558.

"An Indictment should charge the crime alleged to have been committed with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged." This was a case in which the whole question of Statutory Crime is considered. To argue that this Count comes up to the requirements, as here asserted, would seem to me a travesty on Justice.

I respectfully submit the case.

SAMUEL McKEE,

For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
NOV 21 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

WILLIAM H. MARKHAM, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 544.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

WILLIAM H. MARKHAM, PLAINTIFF in error,
v.
THE UNITED STATES.

No. 544.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

William H. Markham, plaintiff in error, was indicted for perjury, alleged to have been committed October 7, 1892, before a special examiner of the United States Pension Bureau at Bowling Green, Ky. He was tried and convicted October 4, 1894, the conviction being under the fourth count of the indictment. A motion in arrest of judgment was made, which seems to have been heard by more than one judge; but the names of the judges do not appear in the record. The sole assignment of error is to the overruling of this motion in arrest of judgment.

The special objections to the fourth count of the indictment are that it does not sufficiently appear that the examiner was authorized to administer the oath alleged; that the proceeding or cause in which the oath was taken is not set forth; that the alleged false statement does not appear to have been material to the inquiry, and that the false statements are not stated to have been sworn to "willfully and corruptly."

The opinion of the district court on the motion is to be found at pages 7–10 of the printed record.

The indictment is found under the provisions of Rev. Stat., § 5392:

> Every person who, having taking an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, etc.

This section was discussed by the court in *Cuba* v. *United States* (152 U. S., 211), and held applicable to any case where an oath was authorized by statute or by any rule or regulation drawn in accordance with a statute.

Special examiners of the Pension Office are authorized to administer oaths by the act of March 3, 1891, ch. 548, § 3, when examining into the matter of pension claims, whether pending or adjudicated. (Rev. Stat., § 4744, as amended by the act of July 25, 1882, ch. 349, § 2.)

The first count of the indictment stated that the oath in question was administered in connection with a deposition in regard to a claim for pension. The allegation

in the fourth count, however, was less precise. It was stated simply that—

> The matter of the hereinafter mentioned deposition became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States at Washington, in the District of Columbia; whereupon said William H. Markham did then, at said Bowling Green, willfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer, and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham subscribed was then and there true, etc.

The question asked and the false answer given are then set forth. It is alleged that Markham knew the falsity of the answer, and committed "willful and corrupt perjury."

ARGUMENT.

The learned trial court seems to have regarded this indictment as incorrect in form (although sufficient in substance) because it alleged merely that the deposition was material, instead of setting forth facts tending to show its materiality. This concession was based upon two opinions in Blatchford's reports, which opinions, however, it is respectfully submitted, must have been based upon most cursory examination of the authorities.

The law seems to be very well settled that a simple statement of materiality is sufficient.

The early English cases are cited by Mr. Justice Cheves in *State* v. *Hayward* (1 Nott & McC., 546, 553), and he lays down the rule as follows:

> It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not necessary to set forth all the circumstances which render them material. The simple averment that they became and were so will be sufficient.

To the same effect are 2 Chitty's Criminal Law, 307; *State* v. *Mumford*, 1 Dev., 519; *Commonwealth* v. *Pollard*, 12 Met., 225, 229; *Commonwealth* v. *Johns*, 6 Gray, 274; and *Commonwealth* v. *Smith*, 11 Allen, 243, 253. Many other cases to the same point are cited by Mr. Bishop, who lays down the rule as follows (2 Bish. Cr. Proc., § 921):

> The materiality of the false testimony to the issue or point of inquiry being an essential element in the offense, it must be averred, and the pleader has his choice between two methods of doing this. He may say that it is material, or he may set out facts from which its materiality will in matter of law appear. He need not do both.

The allegations of the indictment clearly indicate the crime with which defendant was charged. Whatever criticisms may be made upon it are formal in character, and therefore cured by the verdict (Rev. Stat., § 1025).

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

160 U.S. 327

160 - 327.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 617.

THE LEHIGH MINING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

J. J. KELLY, JR., JAMES C. HUBBARD, LEROY DAY, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED MAY 16, 1895.

(15,904.)

(15,904.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 617.

THE LEHIGH MINING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

J. J. KELLY, JR., JAMES C. HUBBARD, LEROY DAY, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Declaration	2	1
Notice	6	3
Order requiring security for costs, &c	8	4
Plea No. 1	9	5
Plea No. 2	10	5
Order for submission	11	6
Judgment	12	7
Order allowing appeal	13	7
Opinion	14	8
Bill of exceptions	19	13
Agreed statement of facts	19	14
Judge's certificate to bill of exceptions	21	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 8, 1895.

	Original.	Print.
Petition for writ of error	21	15
Assignment of errors	22	16
Order allowing writ of error, &c.	22	16
Bond on writ of error	24	17
Writ of error	25	18
Citation	26	19
Proof of service of citation	26½	20
Clerk's certificate	28	20

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Western District of Virginia,* } *To wit:*

At a circuit court of the United States for the western district of Virginia, continued and held at the court-house, in the town of Abingdon, Virginia, on the 30th day of May, A. D. 1894—present, the Honorable John Paul, judge of the western district of Virginia—among other were the following proceedings, to wit:

THE LEHIGH MINING AND MANUFACTURING COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, Plaintiff,

versus

J. J. KELLY, JAMES C. HUBBARD, LEROY DAY, MARY C. JOHNSON, BENJAMIN WILLIAMS, JOHN WILLIAMS, PETER GILLY, JAMES LEWIS, BENJAMIN MITCHELL, ALFRED WITT, DANIEL SHORT, CHARLES S. HALE, L. H. VAUGHN, & S. D. FERGUSON, Defendants. } In Ejectment.

Declaration in Ejectment.

2 Filed Apr. 2nd Rules, 1893.

Circuit Court of the United States for the Western District of Virginia.

The Lehigh Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen and resident of the said State of Pennsylvania, complains of J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and S. D. Ferguson, the last two of whom are partners in trade under the firm name and style of L. H. Vaughn & Co., all of whom are residents and citizens of the State of Virginia, and all of whom reside in said western district of Virginia, of a plea of trespass, for this, to wit: that heretofore, to wit, on the 4th day of April, 1893, said plaintiff was possessed of and for an estate in fee-simple absolute of a certain tract or parcel of land lying and being on Powell's river and the waters thereof, in the county of Wise, State of Virginia, and within the jurisdiction of the said court, and bounded as follows, to wit:

Beginning at a large spruce pine in the south bank of Powell's river, three hundred and sixty feet east of Kelly Cave branch, thence north five degrees east, crossing Powell's river and Bear Pen branch at four hundred and twenty-nine feet to a stake; thence north seventy degrees forty-seven minutes east, almost parallel with Bear

Pen branch, two thousand five hundred and eighty-three feet to two chestnuts and water oak by a path near the head of Bear Pen branch; thence north ten degrees west six thousand four
3 hundred and forty-six feet to a spruce pine, chestnut, small sourwood, and locust on the west side of a ridge; thence north forty-four degrees west, crossing two branches, two thousand three hundred and ten feet to a stake; thence north twenty degrees west six hundred and forty-six feet to a stake on bank of Roaring fork; thence north six degrees east, crossing a branch, one thousand and seventy-four feet to a stake above the house now occupied by James Hash; thence south forty-five degrees seven minutes west, crossing Cane Patch fork and Roaring fork, one thousand and five feet to a stake on the south bank of Roaring fork; thence north fifty-eight degrees forty-two minutes west two thousand seven hundred and forty-eight feet to a marked black oak, big hollow chestnut, and down maple on top of a ridge; thence with the top of the ridge the three following courses and distances, namely, south eighty-three degrees thirty minutes west three hundred and sixty feet to a marked white oak, with chestnut pointers; south seventy-three degrees fifteen minutes west two hundred and twenty-nine feet to a marked chestnut snag, with pointers, and north eighty-nine degrees thirty-five minutes west one thousand and twenty feet to two dogwoods, with pointers; thence, leaving the top of the ridge, north sixty-two degrees east two thousand nine hundred and eighty-one feet to a stake on the south bank of Roaring fork; thence north seventy-two degrees thirty-nine minutes west, crossing Roaring fork at five hundred feet and at two thousand two hundred feet, and crossing McKinney branch at three thousand seven hundred and forty-five feet and at six thousand feet, six thousand one hundred and eighty-one feet to a stake about one hundred feet above
4 McKinney branch; thence south eighty-three degrees west one thousand and seven hundred and sixty-three feet to a chestnut near McKinney branch; thence south sixty-three degrees sixteen minutes west four hundred and seven feet to two small birches on McKinney branch; thence north eighty-five degrees ten minutes west, crossing Nine-mile spur at one thousand feet, three thousand seven hundred and twenty-four feet to a poplar near a branch; thence south twenty-one degrees thirty-seven minutes west, crossing two small branches, one thousand four hundred and sixty-five feet to a chestnut and dogwood on the north side of a spur; thence south forty-six degrees east two thousand two hundred and two feet to a stake a little east of the top of Nine-mile spur; thence south fifteen degrees west one thousand six hundred and seventy-six feet to a stake; thence north eighty-one degrees west, crossing Nine-mile spur at three hundred and seventeen feet, two thousand four hundred and forty-seven feet to a stake; thence south eleven degrees east one thousand nine hundred and eighty feet to a chestnut oak; thence north seventy-six degrees east seven hundred and ninety-one feet to a stake in a branch; thence south thirty-nine degrees twenty-three minutes east six thousand and forty-four feet to a white oak and chestnut on top of a spur; thence south eight hun-

dred and twenty-five feet to a stake; thence south fifty degrees east one thousand and twenty-three feet to a stake; thence north eighty degrees ten minutes east, crossing a small branch at two hundred and ten feet, one thousand three hundred and ninety-eight feet to a stake; thence south twenty-two degrees west one thousand three hundred and fifty-nine feet to a stake; thence south
5 eighty degrees east one hundred and sixty-five feet to a stake; thence south twenty-four degrees east, crossing the Louisville & Nashville railroad and Powell's river, seven hundred and twenty-six feet to poplar and spruce pine stumps on south bank of Powell's river; thence north eighty-one degrees twenty minutes east nine hundred and twenty feet to a large maple on east side of a ridge; thence south sixteen degrees east one thousand four hundred and eighty-three feet to a hickory stump, with oak pointers, on top of a ridge; thence north eighty-six degrees four minutes east, crossing Powell's river four times, as follows, namely, at six hundred and five feet, and at one thousand three hundred and five feet, and at four thousand two hundred and fifty-five feet, and at four thousand six hundred and fifty-five feet, and crossing the Louisville & Nashville railroad at three thousand nine hundred and twenty feet, and at five thousand and eighty-five feet, and at six thousand seven hundred and fifty feet, and crossing Kelly Cave branch at six thousand nine hundred and ninety-five feet, seven thousand three hundred and fifty-five feet, to the place of beginning, containing four thousand one hundred and fifty-seven acres, more or less; and the said plaintiff says that it being so possessed of said tract or parcel of land the said defendants afterwards, to wit, on the 5th day of April, 1893, entered into the same, and that they unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff ten thousand dollars; and thereupon it brings its suite.

R. A. AYERS,
BULLITT & McDOWELL,
Att'ys for Plaintiff.

6 To J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and L. D. Ferguson, partners in trade under the firm name and style of L. H. Vaughn & Co.:

You are hereby notified that the foregoing declaration in ejectment against you will be filed in the clerk's office of the circuit court of the United States for the western district of Virginia, at Abingdon, Virginia, at rules to be holden for said court on the 17th day of April, 1893.

THE LEHIGH MINING & MANUFACTURING CO.,
By R. A. AYERS AND BULLITT & McDOWELL,
Attorneys for said Company.

Endorsed: Executed the within declaration and notice on James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred

Witt, Daniel Short, and Charles Hale on the 8th day of April, 1893, and on J. J. Kelly, Jr., on the 11th day of April, 1893, by delivering to them and each of them a true copy thereof in Wise county, Virginia. John G. Watts, U. S. marshal/ for the western district of Virginia, by W. B. Renfro, deputy marshal/.

1893, 2 April rules.

7 Dec. filed and C. O. as to J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale.

1893, 1 May rules.
C. O. C. as to same defendants.

Executed this 13th day of April, 1893, by delivering a copy of the within to S. D. Ferguson, at his office, in the city of Roanoke, Va.; also a true copy of the within to L. H. Vaughn, at his home, in the city of Roanoke, all in the western district of Virginia.

JOHN G. WATTS,
Marshall, West. Dist. of Virginia,
By J. W. MILLS,
Deputy Marshall.

1893, 2 April R.
Dec. filed and C. O. as to S. D. Ferguson, L. H. Vaughn.
1893, 1 May R.
C. O. C. as to same defendants.

8 *Order Filing Pleas, &c.*

Filed May 3rd, 1893.

At a regular term of the circuit court of the United States, continued and held for the western district of Virginia, in the fourth circuit, at Abingdon, on Saturday, the 13th day of May, A. D. 1893.
Present: Hon. John Paul, district judge, presiding.

THE LEHIGH MINING AND MANUFACTURING CO.
versus
J. J. KELLY, JR., JAMES C. HUBBARD, LEROY DAY, MARY C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Beajamin Mitchell, Alfred Witt, Daniel Short, Charles Hale, and L. H. Vaughn and S. D. Ferguson, the Last two of whom are Partners in Trade under the Firm Name and Style of L. H. Vaughn & Co.

This day came the defendants herein, by counsel, and moved that the plaintiff be required to give security for costs; whereupon the court required the plaintiff to give bond in the sum of two hundred dollars, conditioned according to law, and gave the plaintiff

sixty days within which to execute said bond; and the de-
9 fendant then filed two pleas in writing, upon which the plaintiff took issue; and the defendants further say that they are not guilty of the said trespass above laid to their charge or any part thereof, in manner and form as the said plaintiff hath above thereof complained, and of this the said defendants put themselves upon the country, and the plaintiff doth the like; and, upon motion of plaintiff, J. P. Wolfe and H. E. Fox are hereby appointed surveyors herein, and both or either of them are hereby authorized and directed to go upon the lands in controversy on the 29th day of May, 1893, if fair, and if not, then on the next fair day, and survey and lay out the same as either or any party hereto may direct, and return ten fair plats and three reports thereof to the court, and the marshal of this court will, — requested, attend said survey and remove force, if any shall be offered: and this cause is continued.

J. J. KELLY, JR., *et al.*
ads.
LEHIGH MINING AND MANF'G CO.

Plea No. 1.

Filed May 13th, 1893.

J. J. KELLY, JR., *et als.*
ads.
LEHIGH MINING AND MANUFACTURING CO. } 1.

And for plea in this behalf said defendants say that the Virginia Coal and Iron Company is a corporation organized and ex-
10 isting under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendant J. J. Kelly, Jr., described in the declaration in this case, and said defendants say that, for the purpose of fraudulently imposing on the jurisdiction of this court, said Virginia Coal and Iron Company has during the year 1893 attempted to organize, form, and create under the laws of the State of Pennsylvania a corporation out of its (the Virginia Coal and Iron Co.'s) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United States court, and said defendants say that said Lehigh Mining and Manufacturing Co. is simply another name for the Virginia Coal and Iron Co., composed of the same parties and organized alone for the purpose of giving jurisdiction of this case on this court; wherefore defendants say that this suit is in fraud of the jurisdiction of this court and should be abated.

And this they are ready to verify, &c.

BLAIR, DUNCAN, &c.,
Att'ys for Defendants.

This day J. J. Kelly, Junior, personally appeared before me, I. C. Fowler, clerk of the United States circuit court for the western district of Virginia, and made oath that the foregoing plea is true to the best of his knowledge, information, and belief.

Given under my hand this 12th day of May, 1893.

I. C. FOWLER, *Clerk.*

Plea No. 2.

Filed May 13th, 1893.

J. J. KELLY, JR., *et als.* *adls.*
THE LEHIGH MINING AND MANUFACTURING CO. } In Ejectment.

And for further plea in this behalf the said defendants come and say that said plaintiff should not further have or maintain said suit against them, because they say there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal and Iron Company, which is a corporation organized and existing under the laws of Virginia and a citizen of Virginia.

11 And said defendants further say that said Virginia Coal and Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States court and of conferring an apparent jurisdiction on said court, did, by prearrangement, fraud, and collusion, attempt to organize said Lehigh Mining and Manufacturing Company as a corporation of a foreign State, to take and hold the land in the declaration mentioned for the purpose of giving this court jurisdiction of said suit; wherefore defendants say that the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court.

Wherefore they pray judgment, &c., that this suit be abated and dismissed, as brought in fraud of this court's jurisdiction.

And this they are ready to verify, &c.

BLAIR, DUNCAN, &c.,
For Def'ts.

This day personally appeared before me, I. C. Fowler, clerk of the United States circuit court for the western district of Virginia, and made oath that the facts stated in the above plea are true to the best of his knowledge, information, and belief.

Given under my hand this 12th day of May, 1893.

I. C. FOWLER, *Clerk.*

Order to Submit to Court.

Filed Oct. 20th, 1893.

At a regular term of the circuit court of the United States, continued and held at Abingdon, for the western district of Virginia, in the fourth circuit, on Friday, the 20th day of October, 1893.

Hon. Nath. Goff, circuit judge, and Hon. John Paul, district judge, presiding.

12 THE LEHIGH MINING & MANUFACTURING COMPANY *vs.* J. J. KELLY. } In Ejectment.

This day came the parties, by their attorneys, and by consent it is agreed that the matter of the jurisdiction of this court raised by said defendant's pleas be submitted to the court upon affidavits and briefs of both plaintiff and defendant, to be filed within sixty days from this date, and copies of said affidavits to be given to each parties & copies of briefs to be furnished to counsel on each side.

Enter this in common-law order book.

N. GOFF.

Oct. 20, '93.

Order of Judgment of Court and Tender Bill of Exception.

Filed May 30th, 1894.

At a regular term of the circuit court of the United States, continued and held for the western district of Virginia, in the fourth circuit, at Abingdon, on Wednesday, the 30th day of May, A. D. 1894.

Present: Hon. John Paul, district judge, presiding.

LEHIGH MINING & MAN'F'G CO. *vs.* J. J. KELLY, JR., *et al.* } In Ejectment.

13 This day came again the parties, by their attorneys, and on motion of the defendants to dismiss this suit because instituted and prosecuted in fraud of the jurisdiction of the court, by consent of the parties the cause came on to be heard upon the two pleas in writing to the jurisdiction heretofore filed in the case at the proper time, and general replication thereto, and the agreed statement of facts signed by the attorneys and filed therein, the exceptions endorsed thereon; and the court, having fully considered the said two pleas, the agreed statement of facts aforesaid, and the exception to a certain paragraph in the said agreed statement of facts, and argument of counsel, doth consider that the said exceptions *is* not well taken and overrules the same; and the court further considers that the said pleas be, and they are hereby, sustained, and

for reasons in writing, filed herewith as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be, and the same is hereby, dismissed for want of jurisdiction, but without prejudice to the parties to this suit.

And the court doth further consider that the defendants recover of the plaintiffs his costs about his defense expended.

MEMORANDUM.—That party plaintiff, feeling itself aggrieved by this order, tendered its bill of exceptions thereto and prayed an appeal therefrom, which is allowed and ordered to be certified.

JOHN PAUL,
District Judge.

May 30th, 1894.

14 And the said opinion of the court and the said bill of exceptions referred to in the foregoing order are in the words and figures following, to wit:

Opinion. Filed May 30th, 1894.

THE LEHIGH MINING AND MANUFACTURING CO., Plaintiff, *vs.* J. J. KELLY and Others, Defendants. } In Ejectment.

This is an action of ejectment brought by the plaintiff, a corporation under the laws of Pennsylvania, against J. J. Kelly, Jr., and others, citizens of the State of Virginia.

The defendants file two pleas in abatement. Said pleas are as follows:

Plea No. 1.

And for plea in this behalf said defendants say that the Virginia Coal and Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendant J. J. Kelly, Jr., described in the declaration in this case, and said defendants say that for the purpose of fraudulently imposing on the jurisdiction of this court said Virginia Coal & Iron Company has, during the year 1893, attempted to organize, form, and create under the laws of the State of Pennsylvania a corporation out of its (the Virginia Coal & Iron Co.'s) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United States court; and said defendants say that said Lehigh Mining & Manufacturing Co. is simply another name for the Virginia Coal & Iron Co., composed of the same parties, and organized alone for the purpose of providing jurisdiction of this case on this court; wherefore defendants say that this suit is in fraud of the jurisdiction of this court and should be abated.

And this they are ready to verify, &c.

Plea No. 2.

And for further plea in this behalf the said defendants come and say that said plaintiff should not further have or maintain said suit against them, because they say there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal & Iron Company, which is a corporation organized and existing under the laws of Virginia and a citizen of Virginia: and said defendants further say that said Virginia Coal & Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States court and of conferring an apparent jurisdiction on said court, did, by prearrangement, fraud, and collusion, attempt to organize said Lehigh Mining and Manufacturing Company as a corporation of a foreign State, to take and hold the land in the declaration mentioned, for the purpose of giving this court jurisdiction of said suit; whereupon defendants say that the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court: whereupon they pray judgment, &c., that this suit be abated and dismissed, as brought in fraud of this court's jurisdiction; and this they are ready to verify, &c.

The plaintiff and the defendants have agreed to submit the questions of law arising on these pleas to the court for decision, the submission being on the following agreed statement of facts:

Agreement.

Circuit Court of the United States for the Western District of Virginia.

LEHIGH MINING AND MANUFACTURING COMPANY
vs.
J. J. KELLY, JR., and Others.

It is hereby agreed between the parties to this action as follows, to wit:

1st. That the land in controversy in this case was prior to March 1st, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years prior to said date.

2nd. That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the State of Virginia, and is a citizen of Virginia.

3rd. That on March 1st, 1893, said Virginia Coal and Iron Co. executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Co., by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee-simple.

4th. That said Lehigh Mining and Manufacturing Co. is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

5th. That the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Co. all of the right, title, and interest of said Virginia Coal and Iron Co. in and to said land, and that since said conveyance said Virginia Coal and Iron Co. has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of
16 the stock of said Lehigh Mining and Manufacturing Co. and has no interest therein whatever.

6th. That the two pleas in writing filed by the defendants in this cause at the May term, 1893, of this court shall be tried by the court without a jury upon the foregoing statement of facts, but that any party may object to any of such statements on the ground of irrelevancy or incompetency.

Plaintiff filed the following exception to the foregoing agreement:

The plaintiff, by counsel, objects and excepts to the statement in the first part of the 5th paragraph of the foregoing agreed facts, viz., "that the purpose of organizing the Lehigh Mining and Manufacturing Co. and in making to it said conveyance was to give to this court jurisdiction in this case," because the same is irrelevant and immaterial.

The substance of these pleas is that the plaintiff has by collusion between itself and the said Virginia Coal & Iron Company been made a party to this suit in order to give this court jurisdiction of this case.

This question is mainly to be determined by the 4th and 5th paragraphs of the agreement of facts, which are as follows:

4th. "That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of the commencement of this action a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company."

5th paragraph. "That the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said Virginia Coal and Iron Company has had no interest in said land and has not and never has had any interest in this suit, and that it owns

none of the stock of said Lehigh Mining and Manufacturing Company and has no interest therein whatever."

Counsel for the defendants contend that the following admitted facts in these paragraphs show that this is a collusive suit and a fraud on the jurisdiction of the court.

That the plaintiff company was organized a short time before the conveyance of the land in controversy was made and before the bringing of this suit; that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company; that the purpose and the only declared purpose in organizing the Lehigh Mining and Manufacturing Company and in making the deed of conveyance to it by the Virginia Coal and Iron Company was to give the Federal court jurisdiction of this action, brought to try the title to the land in controversy.

Counsel for plaintiff contend that although these facts are admitted and are true, yet as the Virginia Coal and Iron Company has no interest in this suit and owns none of the stock in the Lehigh Mining and Manufacturing Company and has no
17 interest therein, and although it conveyed the land to the plaintiff to enable it to maintain an action in this court, motives are immaterial and cannot be inquired into. They cite:

1 Peters, 620.
18 Howard, 76.
6 Wallace, 280.
7 Howard, 198–215 (not examined).

These cases, in the opinion of the court, do not sustain the position of counsel, and the exception filed by counsel for the plaintiff to part of the 5th paragraph, which states "that the purpose of organizing the Lehigh Mining and Manufacturing Company an- in making to it said conveyance was to give this court jurisdiction in this case," because the same is irrelevant and immaterial, is not well taken. The motive, the object of parties in putting themselves or others in a position to invoke the jurisdiction of the Federal courts, is a subject of inquiry running through all the cases on this subject.

And since the statute of 1875 it is said, "If from any source the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having a proper issue joined and tried or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

Hardesty *vs.* Memory, 116 U. S., 588.

To preclude the court from inquiring into the motives, objects, intentions, aims, and purposes of parties and confine it alone to a consideration of their actions would be to render it in many instances helpless in its investigation of frauds on its jurisdiction.

Section 5 of the statute of 1875 provides—

"That if in any suit commenced in a circuit court or removed

from a State court to a circuit court of the United States it shall appear to the satisfaction of said circuit court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remove it to the court from which it was removed, as justice may require," &c.

In Greenway *vs.* Tucker and others, 10th Federal Reporter, 884, it was held that "the transfer by a blank deed *mala fide*, without consideration, of the title to land in one State to a citizen of another State for the purpose of bringing suit in a Federal court will not enable the grantee to maintain a suit in ejectment in such court."

The consideration of the deed from the Virginia Coal and Iron Company to the plaintiff is not given in the agreement of facts.

It is termed "a deed of bargain and sale." If the consideration was given, the case just cited might be an authority in this
18 case or it might not be applicable; but, noting the principle in that case and in other cases referred to in argument and applying it to the case at bar, we might express the court's conclusion as follows:

The organization by the individual stockholders and officers of a corporation existing under the laws of one State of a corporation under the laws of another State for the express purpose of bringing a suit in a Federal court to try the title to a tract of land claimed by the former corporation and conveyed to the latter after its organization and before suit brought will not enable the grantee to maintain a suit in ejectment in such court.

This is truly a novel case. We find no precedent for the devices here employed to deprive the citizen of his right to have his title to his property litigated in the courts of his State and to compel him to make his defence before a Federal tribunal.

The claims of the plaintiff that the Virginia Coal and Iron Company has no interest in this suit, that it has no stock in the plaintiff company, and that by the conveyance of the tract of land in controversy it conveyed all its right, title, and interest to the plaintiff, may be technically correct, but it is to the average mind, as a matter of fact, difficult to conceive how the individual stockholders and officers of one corporation can organize another corporation for the express purpose of bringing suit to try the title to a tract of land belonging to them as individual stockholders, and officers of the first corporation can have said tract of land conveyed to the second corporation, of which they are also individual stockholders and officers, and then bring suit to recover said tract of land, and yet have no interest in the suit.

The difficulty to understand this is increased where the facts show that the only tract of land held by the second corporation is that conveyed to it by the first corporation for the purpose of bringing suit to try the title to the land.

This court cannot give its sanction to such a device to invoke its jurisdiction. To approve such a scheme would be equivalent to transferring the litigation of all land titles, where a Virginia corporation claims title to land against an individual citizen of Virginia, into the Federal courts.

All that would be necessary to accomplish this would be for "the individual stockholders and officers" of a Virginia corporation to organize in another State a corporation for the purpose of bringing suit in a Federal court to try the title to the tract of land in dispute, and then take a conveyance of the tract of land from the Virginia corporation to the foreign corporation.

The device might be carried still further. An individual citizen, finding himself in a controversy with his neighbor concerning a tract of land and desiring to have the question tried in a Federal court, could very readily organize a corporation in another State for the purpose of bringing a suit in the Federal court, then convey whatever interest he claims in the land to the foreign corporation of his own creation and in which he is the only stockholder, and the courts of the United States would be open to him to litigate in a Federal court a question that the laws of the land, State and
19 Federal, contemplate shall be litigated in the courts of the State of which both parties are citizens.

The court is already of opinion that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court; that the plaintiff has been collusively made a party to it for the purpose of making a case cognizable in a Federal court, and this case must be dismissed.

Bill of Exceptions.

Filed May 30th, 1894.

At a regular term of the circuit court of the U. S. continued and held for the western district of Va., in the fourth circuit, at Abingdon, on Wednesday, the 30th day of May, A. D. 1890.

Present: Hon. John Paul, dist. judge, presiding.

LEHIGH MINING AND MANUFACTURING CO. *vs.* J. J. KELLY and Others. } Bill of Exception.

Be it remembered that upon the trial of the issue on the pleas numbered one and two, and on file in this cause, to the jurisdiction of the court, and the motion of the def'ts to dismiss the cause for want of jurisdiction, the parties, plaintiff and defendant-, agreed — the facts, which are in the words and figures following:

Circuit Court of the United States for the Western District of Virginia.

LEHIGH MINING AND MANUFACTURING CO.
vs.
J. J. KELLY, JR., & Others.

It is hereby agreed between the parties to this action as follows, to wit:

1st. That the land in controversy in this case was, prior to March 1st, 1893, claimed by the Virginia Coal and Iron Company and had been claimed by said last-named company for some twelve years prior to said date.

2nd. That said Virginia Coal and Iron Co. is a corporation organized and existing under the laws of the State of Virginia and is a citizen of Virginia.

3rd. That on March 1st, 1893, said Virginia Coal and Iron Co. executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Co., by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee-simple.

4th. That said Lehigh Mining and Manufacturing Co. is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

3rd. That the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Co. all of the right, title, and interest of said Virginia Coal and Iron Co. in and to said land, and that since said conveyance said Virginia Coal and Iron Co. has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Co., and has no interest therein whatsoever.

6th. That the two pleas in writing filed by the defendants in this cause at the May term, 1893, of this court shall be tried by the court without a jury upon the foregoing statement of facts, but that any party may object to any of such statements on the ground of irrelevancy or incompetency.

WHITE & BUCHANAN,
A. L. PRIDEMORE,
J. F. BULLITT, JR.,
AND OTHERS,
Att'ys for Plaintiff.
C. T. DUNCAN,
For Defendants.

The plaintiff, by counsel, objects and excepts to the statement in the first part of the 5th paragraph of the foregoing agreed facts, viz., "that the purpose of organizing the Lehigh Mining and Manufacturing Co. and in making to it said conveyance was to give to this court jurisdiction in this case," because the same is irrelevant and immaterial.

WHITE AND BUCHANAN,
FULTON AND PRIDEMORE, AND
BULLITT, *Attorneys.*

Agreed facts. Filed May 18th, 1894.

21 and submitted the questions arising on said pleas to the decision of the court, waiving a jury, and the court decides the questions at issue on said pleas in favor of the defendant, and held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed; to which opinion and action of the court the plaintiff did then and there except; and forasmuch as the facts aforesaid do not appear of record, and in order that it may have the benefit of his said exception, the plaintiff prays that this its bill of exception may be allowed, which is accordingly signed, sealed, and made a part of the record.

JOHN PAUL, [SEAL.]
Dist. Judge.

Petition for Writ of Error.

Filed May 30th, 1894.

And on the same day came again the parties, by counsel, and the plaintiff filed its petition for a writ of error and assignment of errors; which petition and assignment are in words and figures following, to wit:

Petition for Writ of Error.

Filed May 30th, 1894.

To the honorable judges of the circuit court of the United States for the western district of Virginia:

Your petitioner, The Lehigh Mining and Manufacturing Company, would respectfully represent that it is aggrieved by the rulings of said court in the ejectment cause of the Lehigh Mining & Manufacturing Company against J. J. Kelly, Jr., and others, in which final judgment dismissing the plaintiff's declaration was rendered at the May term, 1894, of the said court held at Abingdon, Va., and your petitioner says that in the record and proceedings in said cause there is manifest error, as is fully set forth and shown in the assignments of error which accompany this petition and to which reference is here made.

Your petitioner therefore prays that a writ of error may be allowed him to said judgment and proceedings to the Supreme Court

of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, may be sent to said Supreme Court.

THE LEHIGH MINING & MANUFACTURING COMPANY,
By WHITE & BUCHANAN,
R. A. AYERS,
R. C. DALE,
E. M. FULTON,
A. L. PRIDEMORE, AND
J. F. BULLITT, JR., *Counsel for Petitioner.*

22 *Assignment of Errors.*

Filed May 30th, 1894.

Circuit Court of the United States for the Western District of Virginia.

THE LEHIGH MINING AND MANUFACTURING COMPANY *vs.* J. J. KELLY, JR., *et al.* } Assignment of Errors.

The Lehigh Mining and Manufacturing Company, plaintiff in the above-named cause, by counsel, says that in the proceedings and judgment in said cause entered at the May term of said court, 1894, there is a manifest error in this, to wit:

The court erred in holding that it had not jurisdiction in said cause and in holding that your petitioner is not a *bona fide* corporation, organized and existing under the laws of the State of Pennsylvania, and erred in holding that the controversy in said cause was not substantially between citizens of different States, and erred in dismissing the declaration in said cause for lack of jurisdiction.

R. A. AYERS,
R. C. DALE,
WHITE & BUCHANAN,
E. M. FULTON,
A. L. PRIDEMORE, AND
J. F. BULLITT, JR.,
Counsel for Plaintiff in Error.

Order Granting Writ of Error.

Filed May 30th, 1894.

At a regular term of the circuit court of the United States, continued and held for the western district of Virginia, at Abingdon, in the fourth circuit, on Wednesday, the 30th day of May, A. D. 1894.

Present: Hon. John Paul, dist. judge.

LEHIGH MINING & MANUFACTURING CO.
vs.
J. J. KELLY, JR., *et al.*
} In Ejectment.

23 The plaintiff considering itself aggrieved by the rulings of said court in the said case, in which final judgment was rendered at the May term, 1894, to wit, on May 30th, 1894, of said circuit court held at this place, dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof, and having on the 30th day of May, 1894, filed its bill of exceptions, and having on this day filed its assignment of errors and its petition praying for a writ of error to said judgment and proceedings to the Supreme Court of the United States upon the said question of jurisdiction, and praying that said writ of error be allowed it to the said Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, be sent to said Supreme Court:

Now, on this day, to wit, May 30th, 1894, it is ordered and considered by this court that said writ of error be allowed and awarded as prayed for, and the clerk is directed to make a transcript of the record and proceedings in said case, duly authenticated, as soon as the business in his office will permit, as provided for in the petition herein; and the court doth order that said plaintiff, or some one for it, execute a bond in the penalty of $300.00, conditioned for the payment of all costs, if the same shall be affirmed, and abide the further order of this court, said bond to be approved by one of the judges of this court, and upon that being done no execution shall issue pending the appellate proceedings.

JOHN PAUL,
Dist. Judge.

May 30th, 1894.

24 No. 205.

Appeal Bond. Filed April 2nd, 1895.

Know all men by these presents that I, J. K. Taggart, am held and firmly bound unto J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and L. D. Ferguson, the last two being partners under the firm name of L. H. Vaughn & Co., in the full and just sum of three hundred dollars ($300.00), to be paid to them or their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a circuit court of the United States for the western district of Virginia, at Abingdon, in a suit depending in said court between The Lehigh Mining and Manufacturing Company, plaintiff, and said J. J. Kelly, Jr., and the other covenantees

in this bond, defendants, a judgment was rendered against the said Lehigh Mining and Manufacturing Company for costs and dismissing its declaration in said cause, and the said Lehigh Mining and Manufacturing Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said J. J. Kelly, Jr., and the said other defendants above named, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the day in the citation mentioned:

Now, the condition of the above obligation is such that if the said The Lehigh Mining and Manufacturing Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

J. K. TAGGART. [SEAL.]

Sealed and delivered in the presence of—
J. P. WOLFE.
JAMES M. HODGE.
J. M. GOODLOE.

Approved by—
JOHN PAUL,
U. S. Dist. Judge for the
Western District of Virginia.

April 2nd, 1895.

STATE OF VIRGINIA, *County of Wise*, } *To wit:*

I, R. P. Barron, a notary public in and for the county and State aforesaid, do hereby certify that J. K. Taggart, whose name is signed to the foregoing bond, this day appeared before me, in my county aforesaid, and acknowledged the same, and that the said Taggart made oath before me that he is reasonably worth, over and above all just indebtedness, the sum of $5,000.00.

Given under my hand this 19th day of March, 1895.

[Seal of Notary Public.]

J. B. BARRON,
Notary Public, Wise County, Virginia.

25 *Writ of Error. Filed April —, 1895.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you

or some of you, between The Lehigh Mining and Manufacturing Company, a corporation, &c., *versus* J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams and John Williams, Peter Gilley, James Lewis, Benjamin Mitchell, Alfred Witt, Charles S. Hale, L. H. Vaughn, S. D. Ferguson, Daniel Short, in ejectment, a manifest error hath happened, to the great damage of the said The Lehigh Mining and Manufacturing Company, a corporation, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 20th day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Western District of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 20th day of April, in the year of our Lord one thousand eight hundred and *ninety* 95.

I. C. FOWLER,
Clerk of the Circuit Court of the United States, at Abingdon, Va.

Allowed by—
JOHN PAUL,
U. S. District Judge, West. Dist. of Va.

26 *Citation. Filed May* 7, 1895.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilley, James Lewis, Benjamin Mitchell, Alfred Witt, Chas. S. Hale, L. H. Vaughn, S. D. Ferguson, and Daniel Short, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 20th day of May next, pursuant to a writ of error from a judgment of the circuit court of the United States of America for the western district of Va., in the fourth circuit, at Abingdon, in your favor, passed in a cause in said court wherein The Lehigh Mining and Manufacturing Company, a corporation, &c., is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal United States Circuit Court, Western District of Virginia.]

JOHN PAUL,
U. S. District Judge, Western Dist. of Va.

26½ *Return.*

On this 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Joseph L. Kelly, before me, the subscriber, a notary public in & for Wise county, Virginia, and makes oath *the* he delivered a true copy of the within citation to Wm. S. Mathews, attorney for defendants

Sworn to and subscribed the 22nd day of April, A. D. 1895.

H. C. McDOWELL, Jr.,
Notary Public, Wise Co., Va.

I hereby accept legal service of within citation for J. J. Kelly, Jr., Jas. C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilley, Jas. Lewis, Benjamin Mitchell, Alfred Witt, Chas. S. Hale, & Daniel Short this April 22nd, 1895.

DUNCAN, MATHEWS & MAYNOR, *Att'ys.*

Executed on A. D. Ferguson and L. H. Vaughn by delivering a copy of the within citation to each in person May 6th, 1895.

J. W. PEPPER,
For G. W. LEVI,
U. S. Marshal.

[Written across the face:] Original.

27 And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States of America, at Washington, D. C., and the same is transmitted accordingly.

Teste: I. C. FOWLER, *Clerk*,
Per STUART F. LINDSEY, *D. C.*

28 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Western District of Va., in the Fourth Circuit, at Abingdon, Va. }

I, I. C. Fowler, clerk of the circuit Court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, Va., do hereby certify that the foregoing is a full and true transcript of the record and proceedings in this court in the above case of The Lehigh Mining and Manufacturing Co. *vs.* J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, L. H. Vaughn, and S. D. Ferguson.

Seal United States Circuit Court, Western District of Virginia.

Witness my hand and seal of the said circuit court of the United States, at Abingdon, Va., this 20 day of April, A. D. 1894.

I. C. FOWLER, *Clerk.*

Endorsed on cover: Case No. 15,904. W. Virginia C. C. U. S. Term No., 617. The Lehigh Mining and Manufacturing Company, plaintiff in error, *vs.* J. J. Kelly, Jr., James C. Hubbard, Leroy Day, *et al.* Filed May 16th, 1895.